

DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

*5856 Bayle  
Proc*

*[Protests of Air Force Contract Award]*

FILE: B-199024

DATE: January 9, 1981

MATTER OF: Dataproducts New England, Inc. & DLG05761  
Honeywell Inc.; Tracor Aerospace

DIGEST:

DLG05769

- 1.. Objections to technical specifications as ambiguous, inaccurate, and misleading and objection to RFP's price evaluation scheme are untimely under GAO Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1980) since they constitute protest against alleged solicitation improprieties and protest was not filed here prior to dates for receipt of initial technical and cost proposals.
2. Untimely protest against technical specifications and price evaluation scheme will not be considered on merits under (1) ("significant" issue exception, 4 C.F.R. § 20.2(c) (1980), because matter is not of widespread interest to procurement community) it does not affect broad class of procurements, and it does not go to heart of competitive process, or (2) ("inextricably intertwined" issue exception because each untimely alleged impropriety is easily severable from other timely issues).
3. Contention that competitor's proposal is deficient in several areas is based on protester's erroneous belief that competitor proposed its standard model. Where record reflects that competitor proposed variation of that model to meet all of RFP's requirements and was found technically acceptable by agency, contention is without merit.

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4. RFP's technical specification calling for printer to be "peripheral" to teletype-writer control module (TCM) was changed by amendment, which incorporated questions and answers from preproposal conference, permitting printer to be mounted with TCM. Thus, (protester's argument that competitor's proposal did not meet unrevised requirement is without merit.)
5. Protester contends--for first time on September 2, 1980--that agency did not initiate discussions and that agency failed to advise it of proposed excesses in its technically acceptable proposal. Contention is untimely under 4 C.F.R.   
✓ § 20.2(b)(2) (1980) since protester knew or should have known of facts upon which contention is based in July 1980, at the latest, more than 10 working days prior to time that contention was presented here.
6. Protester contends that competitor gained unfair competitive advantage in instant procurement because agency modified competitor's contract for similar item during instant procurement. Contention is without merit because protester has not shown that initial existing award or two subsequent modifications resulted from unfair Government action or preference for competitor.
7. Protester's suspicions--based on competitor's brochure which is similar to certain of RFP's requirements--are not sufficient to overcome agency's and competitor's denial that competitor participated in preparing instant specifications.
8. Protester's unsupported implication that agency personnel were involved in very serious wrongdoing--providing competitor with better insight into RFP's requirements and possibly protester's prices--is wholly conjectural and without merit.

9. Timeliness aspect of prior decision is affirmed because interested party has not provided any new facts or shown any errors of fact or law in conclusion that protest is timely.
10. Resolution of protest--that agency did not uniformly interpret four mandatory specification requirements for all offerors and that agency failed to advise protester of excesses in its proposal during discussions--is unnecessary since even if agency acted improperly and if protest had merit, protester would not have been low-priced, technically acceptable proposer.
11. GAO will not disturb agency's determination that competitor's proposed printer meets RFP's mandatory requirements where protester's contention is based on erroneous assumption regarding competitor's proposed printer. Further, agency is expected to consider opinion of protester's technical experts when deciding capability of low-priced offer or to deliver what it proposed. To extent that protest concerns that future determination, it is premature.

This is our decision on (1) the protests of Dataproducts New England, Inc. (DNE), and Honeywell Inc. against any award under request for proposals (RFP) Nos. F04606-80-R-0073 and F04606-80-R-J209 issued by the Air Force for 7,500 fixed station teletype-writers for the Department of Defense, and (2) Tracor Aerospace's (Tracor) request for reconsideration of the timeliness aspect of our decision (Honeywell Inc., B-199024, August 21, 1980, 80-2 CPD 137) concluding that Honeywell's protest was timely in part and not premature in part and requesting the Air Force to provide a report on the merits of the protest.

DNE contends that (1) the specifications in the RFP are ambiguous, (2) the Air Force's evaluation procedure was defective, (3) the Air Force did not conduct meaningful discussions with DNE, (4) the separate Air Force award to Tracor for an item similar to the one being procured gave Tracor an unfair competitive advantage in the instant procurement, and (5) the Air Force contracting and technical personnels' visits to Tracor in connection with the separate procurement constituted a conflict of interest and resulted in an appearance of impropriety. Honeywell contends that (1) the specifications were susceptible to more than one reasonable interpretation, (2) the Air Force failed to conduct meaningful discussions with Honeywell, and (3) the Air Force's evaluation of Tracor's proposal was defective. The Air Force reports that both protests present issues which are untimely under our Bid Protest Procedures, and the timely portions of both protests are without merit. Tracor essentially concurs with the Air Force's position.

(DNE's and Honeywell's protests are denied and dismissed in part and Tracor's reconsideration request is without merit.)

#### I. Chronology

This matter concerns a two-step negotiated procurement which included these events: issuance of the first-step request for technical proposals (-0073) on November 1, 1979; a preproposal conference on December 4, 1979; questions and answers distributed on December 10, 1979; closing date for receipt of initial technical proposals on January 14, 1980; Air Force request for clarifications regarding technical proposals on January 28, 1980; responses to clarification requests submitted on February 19, 1980; issuance on March 13, 1980, of the step-two RFP (-0209) to firms which submitted acceptable technical proposals; closing date for receipt of cost proposals on April 16, 1980; and deadline for receipt of best and final offers (following discussions) on May 12, 1980.

On June 10, 1980, DNE filed its protest here and on July 10, 1980, Honeywell filed its protest here. No award has been made.

## II. DNE's Protest

### A. Solicitation Improprieties

DNE's initial protest of June 10, 1980, raised objections to the technical specifications and the price evaluation for including transportation costs and excluding certain other cost items. In essence, DNE argued that the protested technical specifications were ambiguous, defective, inaccurate, misleading, and subject to more than one interpretation. These were DNE's specific arguments:

1. The specification did not define the requirements for composing and editing without a video display unit. While the information was provided in the questions and answers, DNE contends that other offerors may have not noticed it, resulting in a price differential of \$891,700.

2. The mean-time-between-failure requirement was different in two portions of the RFP, resulting in DNE's having to increase the number of proposed hours of testing to demonstrate reliability. DNE is not certain that other offerors were aware of the conflict or that they had to increase their proposed testing hours.

3. The message format requirement conflicts with the priority message requirement.

4. The RFP's parallel-data-interface requirement is subject to two interpretations having a price differential of about \$1,500,000.

5. The operating temperature range is subject to two interpretations.

6. The RFP's requirement for modulation rates is ambiguous, having up to a \$375,000 price impact.

7. The RFP did not define the required poll/select protocol.

8. The requirement for a priority message alarm was not adequately explained in the questions and answers.

9. The RFP's specifications are ambiguous or incomplete for (a) VDU matrix field programming options, (b) additional "chip" positions for memory expansion, (c) a stop feature, (d) the protected-data alarm requirement, and (e) the requirement that all electronics, software/firmware to control and operate all peripherals be located in the teletypewriter control module (TCM).

On July 3, 1980, DNE supplemented its initial protest, arguing that its protest is timely because DNE continually pursued answers to the ambiguities, conflicts, and omissions in the specifications. DNE also stated that it had just discovered new information relative to the ambiguous operating-temperature-range requirement. DNE explains that Honeywell confirmed that its acceptable proposal contained a proposed operating range of 0 to 40 degrees C, whereas DNE responded to 0 to 50 degrees C. In that supplemental protest, DNE contends that the poll/select application referred to in the RFP is incorrect and that the AUTODIN MODE I interface is confusing and lacks definition.

In our view, DNE's objections to the technical specifications and DNE's objections to the price evaluation constitute protests against alleged solicitation improprieties, which were apparent prior to the closing date for receipt of initial technical proposals on January 14, 1980, or for receipt of initial cost proposals on April 16, 1980. In order to be timely, such protests must be filed prior to those initial closing dates as provided in section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980). See California Computer Products, Inc., B-193611, March 6, 1979, 79-1 CPD 150. To the extent that DNE's objections were protested to agency but not resolved at least by date of submission of best and final offer, DNE's protest submitted here more than 10 working days after date for best and final offers is also untimely (4 C.F.R. § 20.2(b)(2) (1980)). Further, Honeywell's subsequent confirmation of DNE's objections does not provide a basis for our Office to find

these aspects of DNE's protest to be timely. Accordingly, these aspects of DNE's protest are untimely.

DNE argues that these aspects should be considered on the merits under the "significant issue" provisions ✓4 C.F.R. § 20.2(c) (1980)) of our Procedures because this large procurement will result in the standard equipment of this type for the next decade. Alternatively, DNE cites our decision in Iroquois Research Institute, ✓55 Comp. Gen. 787 (1976), 76-1 CPD 123, and argues that the untimely aspects of its protest are intertwined with other timely and related issues thus requiring consideration on the merits.

We do not consider the alleged solicitation improprieties raised by DNE to be "significant" within the meaning of section 20.2(c) because the issue presented is not of widespread interest to the procurement community, it does not affect a broad class of procurements, and it does not go to the heart of the competitive procurement process. See CSA Reporting Corporation, ✓59 Comp. Gen. 338 (1980), 80-1 CPD 225. To the contrary, DNE has presented information showing that it believed well in advance of May 12, 1980 (at the latest), that the terms of the RFP required clarification or more detail, and the Air Force was not going to provide it. Yet, the firm elected to compete on the basis of the RFP. In these circumstances, we are not easily persuaded that the protest should be considered on the merits. Further, this situation does not involve inextricably intertwined matters, some of which are timely and some untimely as the one in Iroquois Research Institute did; here, each of the alleged technical improprieties and the alleged price evaluation impropriety is easily severable from the other timely issues.

Accordingly, these aspects of DNE's protest are dismissed.

#### B. Defective Evaluation

On July 3, 1980, DNE first alleged that on June 25, 1980, Tracor employees advised DNE that Tracor proposed to mount the printers within the TCM enclosure, thus violating the RFP's requirement that printers are to be "peripheral" to the TCM. DNE indicates that it redesigned its product to provide for more than just

a single enclosure. DNE concludes that the Air Force should have found Tracor's proposal to be technically unacceptable. On July 15, 1980, DNE states that it obtained a copy of Tracor's brochure on its model 8000 telecommunications terminal and DNE contends that, if Tracor's proposal is based on the model 8000, then its technical proposal is deficient in six or seven areas, outlined in an August 8, 1980, letter to the Air Force. On August 15, 1980, DNE first filed with our Office its analysis of the brochure, and it argues that Tracor's technical proposal was unacceptable if it was based on the model 8000. Citing our decisions in Signatron, Inc., B-181782, April 2, 1975, 75-1 CPD 192, and Willamette-Western Corporation; Pacific Towboat & Salvage Co., 64 Comp. Gen. 375 (1974), 74-2 CPD 259, DNE argues that the competition should be reopened and the RFP revised to adequately state the Air Force's needs. In DNE's view, the Air Force ignored the RFP's mandatory requirements in finding Tracor's proposal technically acceptable with respect to the areas mentioned above. DNE states that the RFP's specifications were mandatory requirements as compared with minimum performance requirements, especially with regard to the printer being "peripheral" to the TCM instead of a single unit.

DNE also charges that, in the Air Force's November 3, 1980, report, the Air Force redefined requirements to permit "some" instead of "all" electronics to be included in the TCM.

Tracor, contrary to DNE's assumption, proposed a derivative of the model 8000 which is fully compliant with the RFP's specifications. The Air Force reports that Tracor's technical proposal is acceptable. Thus, we find this contention, based on DNE's erroneous assumption, to be without merit.

Regarding DNE's contention that the Air Force ignored for Tracor the RFP's mandatory requirement that "all" electronics be included in the TCM, the Air Force notes that the specification provides that the TCM "will contain all the electronics and the software/firmware instructions to control all peripheral equipment." The Air Force explains that this specification meant that all software and hardware/firmware to control the Record Storage Device (RSD) must be in the TCM but the mag tape controller did not have to be located in the RSD. The



Air Force also explains that it would be in excess of its needs to require the mag tape controller in the RSD and that all proposals met the requirement.

Since the RFP called for award to the low-priced, technically acceptable offeror, we need not decide the merits of this issue because DNE states that its proposed cost may have been reduced by about \$500,000, but even that amount would not have made DNE the low-priced proposer. See Jets, Inc., B-195617, February 21, 1980, 80-1 CPD 152.

Regarding DNE's contention that the printer had to be peripheral to the TCM, the Air Force's December 10, 1979, letter, distributing questions and answers from the preproposal conference, indicated that the questions and answers are to be incorporated in any resulting contract and they govern over the solicitation. In response to the question whether the printer could be mounted with the TCM provided all individual requirements for the TCM and printer are met, the Air Force stated that it is the manufacturer's option how the printers are mounted. Further, in that document, the Air Force noted that from an engineering standpoint, throughout all of the equipment, the Air Force is trying to allow manufacturers to use their own ingenuity and methods to come up with the lowest cost.

While DNE may not have observed the import of the Air Force's comments, it appears to us that, by those comments, the Air Force changed the specifications to permit the printer to be mounted with the TCM. Thus, if Tracor proposed that design, Tracor's proposal would not have violated mandatory RFP requirements and this aspect of DNE's protest is without merit.

#### C. Meaningful Discussions

On September 2, 1980, we received DNE's letter dated August 29, 1980, which presented, for the first time, DNE's contention that the Air Force violated procurement statutes and regulations by not advising DNE of deficiencies in its proposal and permitting DNE to correct them. DNE states that no discussions were

ever initiated by the Air Force and the effect of the failure to conduct discussions was not obvious until after best and final offers were submitted.

In its November 18, 1980, submission, DNE states that the Air Force should have told DNE that the printer could be mounted in the TCM as Tracor proposed; DNE reasons that the Air Force knew that DNE had the knowledge to design in that manner. Citing Dynalectron Corporation, 55 Comp. Gen. 859 (1976), 76-1 CPD 167, DNE contends that the Air Force should have discussed weaknesses, excesses, and deficiencies in DNE's proposal.

Regarding DNE's specific reference to the mounting of the printer with the TCM, the matter was known to DNE by July 1, 1980, and the failure-to-conduct-meaningful-discussions argument regarding that specific matter was not presented until September 2, 1980--more than 10 working days after DNE first learned of that possible basis of protest. Thus, under our Procedures, that basis of protest is untimely and will not be considered on the merits. ✓4 C.F.R. § 20.2(b)(2) (1980).

Regarding discussions in general, the record shows that DNE's initial technical proposal was considered susceptible of being made acceptable and that, as a result of responding to the Air Force's written request for clarification, it was reevaluated and found technically acceptable. Further, discussions were held prior to DNE's submission of its best and final offer. In our view, DNE should have learned of any alleged deficiencies in the discussions on or before its July 1, 1980, submission or, at the latest, later in July when it received a copy of Honeywell's protest, which concerned meaningful discussions. Thus, this entire aspect of DNE's protest is untimely and will not be considered since it was not filed here within 10 working days of when it was first learned. ✓4 C.F.R. § 20.2(b)(2) (1980).

#### D. Tracor's Competitive Advantage

First, on July 15, 1980, DNE initially presented its contention that Tracor had gained an unfair competitive advantage in the instant procurement because the Air Force modified Tracor's tactical teletypewriter

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contract to acquire certain fixed-station teletype-writers and supporting peripheral devices. DNE contends that that acquisition unfairly subsidized Tracor in the instant procurement. On September 24, 1980, DNE filed its objections to an Air Force order under the existing Tracor contract for low-speed tactical teletypewriter sets on the ground that it constituted preferential treatment of Tracor.

Secondly, on July 16, 1980, DNE presented a Tracor brochure on the model 8000 telecommunications terminal and referred to a statement in the brochure in which Tracor said that it introduced a modular concept for telecommunications embodying many features currently defined in the instant RFP's specification. From that statement, DNE concludes that the instant specification resulted from Tracor's prior work, giving Tracor an unfair preferential advantage. Further, on September 2, 1980, DNE filed its argument that under procurement regulations, an offeror furnishing a specification cannot compete for the production items.

The Air Force reports that Tracor's tactical teletypewriter contract involves an item of different size, weight, ruggedness, method of manufacture, and capabilities, and that the award to Tracor did not give Tracor an unfair competitive advantage. The Air Force also reports that it was not aware of the Tracor model 8000 brochure until DNE provided one. The Air Force concludes that this aspect of DNE's protest is unsubstantiated and without merit.

Tracor states that the two modifications to its tactical teletypewriter contract did not result from unfair Government action and that its expertise in the manufacture of telecommunications terminals or its tactical teletypewriter contract does not constitute an unfair competitive advantage. Tracor also states that the similarities between the instant specifications and its model 8000 exist because Tracor developed the model 8000 specifications beginning 1 month after the issuance of the specifications which preceded the instant specifications (that procurement was canceled). Tracor denies any participation in drafting the instant specifications.

We recognize that a firm, like Tracor, may have a competitive advantage because it holds a contract with the procuring agency for a similar item and because it has experience in manufacturing items similar to the instant requirement. But, the procuring agency has no duty to attempt to equalize competition as long as the advantage did not result from preference or unfair action by the Government. See, e.g., Ronald Campbell Company, B-196935, December 19, 1979, 79-2 CPD 424. Here, DNE has not shown that the initial tactical teletypewriter award or the two subsequent modifications to that contract resulted from unfair Government action or preference for Tracor in the instant procurement. There has been no showing that the timing of the modifications was motivated out of other than the Air Force's desire to satisfy its minimum needs. Further, DNE's suspicions based on Tracor's model 8000 brochure are not sufficient to overcome the Air Force's and Tracor's denial that Tracor participated in preparing the instant specifications. Moreover, the specifications did not prohibit DNE from competing and DNE has not challenged the specifications as unrepresentative of the Air Force's actual needs. Accordingly, these aspects of DNE's protest are denied.

#### E. Air Force's Visits to Tracor's Facility

DNE states that key Air Force personnel involved in the instant procurement have been involved in the separate Air Force contract with Tracor for tactical teletypewriters. DNE also states that in connection with that contract, the same key Air Force personnel visited Tracor's facility, providing a forum for informal discussion with Tracor personnel during the proposal phase of the instant procurement. DNE contends that such discussions may have provided Tracor better insight and understanding of the RFP's intent than was available to other offerors. DNE further states that such visits occurred during the final pricing phase, after DNE revealed certain prices to such Air Force personnel. DNE believes that if good judgment had been exercised those visits would not have taken place; DNE concludes that those visits constitute a conflict of interest and resulted in an appearance of impropriety.

The Air Force acknowledges that some of its personnel were involved with both matters but the Air Force explains that they were fully aware of the sensitive nature of the situation and they did not participate in the negotiations and they had no knowledge of the standing of the offerors or the proposed prices.

DNE's presentation implies very serious wrongdoing on the part of Air Force and Tracor personnel; however, DNE's presentation is wholly conjectural. We are not going to investigate the integrity of Air Force personnel based on bare allegations of serious impropriety raised by DNE. In view of DNE's lack of supporting evidence and the Air Force's explanation, we find this aspect of DNE's protest to be unmeritorious.

Accordingly, DNE's protest is denied in part and dismissed in part.

### III. Tracor's Reconsideration Request

Tracor requests reconsideration of the timeliness aspect of our decision in the matter of Honeywell Inc., supra--concluding that Honeywell's July 9, 1980, protest was timely in part and not premature in part and requesting an Air Force report on the merits. This request is based on the ground that Honeywell knew or should have known what it was required to propose prior to submission of its best and final offer because the specifications were clear and unambiguous; therefore, to be timely, Honeywell should have protested, at the latest, on May 12, 1980.

In our view, Tracor's approach would require our Office to decide the merits of whether the specifications were clear and unambiguous and then reconsider the timeliness of Honeywell's protest. We have considered Tracor's arguments in support of its reconsideration request and find essentially the same underlying facts and arguments were in the Air Force report on timeliness dated July 28, 1980. Since Tracor has not advanced any new arguments or presented any new facts, we decline to reconsider the timeliness aspect of the prior decision, which is affirmed.

#### IV. Honeywell's Protest

##### A. Specifications and Discussions

Our August 21, 1980, decision concluded that the first and second aspects of Honeywell's protest are essentially that the Air Force was not interpreting the RFP provisions uniformly for all offerors. Honeywell states that four specifications were viewed differently by competitors as requiring different levels of compliance having substantial cost impact. First, Honeywell believes that its interpretation of the parallel data interface requirement was reasonable but different from Tracor's, raising Honeywell's price by about \$1,500,000. Second, Honeywell states that the specification for operating/nonoperating temperature was subject to two interpretations but Honeywell was not prejudiced because it happened to select the least costly interpretation, which was the one the Air Force intended. Third, Honeywell states that the specification for the high speed modulation rate was interpreted differently by the offerors but, again, Honeywell was not prejudiced because it selected the least costly interpretation, which was the one the Air Force intended. Fourth, Honeywell states that the specification for memory was subject to different interpretations and Honeywell selected the most costly one, raising its price by a substantial (but proprietary) amount.

Next, Honeywell contends that the Air Force was aware of the offerors' different interpretations of the specifications but the Air Force failed to resolve the inconsistent interpretations during discussions as it was required to do. Honeywell argues that no reasonable basis can be found for the Air Force's admitted refusal to discuss excesses of the minimum requirements in order to assure the maximum competition at the lowest price.

Honeywell has not seen the evaluated prices submitted by the competitors in this procurement but the Air Force has provided them to our Office. From our computation, even if Honeywell's protest has merit, Honeywell would not have been the low-priced proposer. Therefore, resolution of the merits of these aspects of Honeywell's protest is academic since it would not

be determinative. Thus, the issue need not be decided since it would not have made a difference in the selection of the successful offeror. See Southwest Marine, Inc., B-198701, August 15, 1980, 80-2 CPD 123.

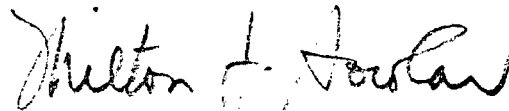
B. Defective Evaluation

Honeywell contends that the printer mechanism proposed by Tracor is not capable of satisfying the mandatory sustained-printer-throughput specification. In part, Honeywell bases its contention on its belief that Tracor proposed its model 8000 but, as noted, Tracor proposed a modified version of its model 8000, which met all the mandatory requirements. Also, in part, Honeywell bases its contention on the opinion of experts that Tracor's printhead mechanism is incapable of meeting the mandatory requirements.

The Air Force reports that Tracor's technical proposal was acceptable and that there is adequate evidence that the proposed printer can meet the requirements. Tracor states that its proposed printer meets the mandatory, sustained-average, 240 characters-per-second requirement.

We have no basis to disturb the Air Force's reasonably based conclusion that the Tracor proposed printer is technically acceptable. Tracor has unconditionally committed to meet the Air Force's requirement, as provided in the RFP; whether Tracor delivers on its commitment is a matter of contract administration, which is primarily the responsibility of the Air Force.

Accordingly, Honeywell's protest is denied in part and dismissed in part.



For the Comptroller General  
of the United States